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IN THE

Supreme Court of the United States

OCTOBER TERM—1978

IVAN DUNCAN,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	PAGE
Facts	1
POINT I—The trial judge properly charged the jury	4
POINT II—The New York statutory scheme does not violate the constitution	5
POINT III—The trial court did not wrongfully refuse to permit a witness to testify	6
Conclusion	8

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RESPONDENT'S BRIEF

Facts

On September 25, 1974, Margaret Harris, 86, and Estelle Robinson, 77, were found dead in Mrs. Harris' Mt. Vernon apartment, the victims of multiple stab wounds.

The evening of September 24, 1974, Ziriphia Mayhew, a niece of Mrs. Harris, and the defendant, Ivan Duncan, went to Mrs. Harris' apartment to get some "scratch" (money). On the way, the defendant obtained a hammer and placed it in the car. When they arrived at the apartment they discovered that Mrs. Harris had guests. The defendant went into the bathroom and bedroom and shortly thereafter, the couple left the apartment and went for pizza. While at the pizza parlor the defendant, referring to Mrs. Harris, said maybe he could "rip her off."

Upon returning, the couple saw that the car driven by Mrs. Harris' guests was no longer in the parking lot. The defendant's reaction was "Well, let's kill those bitches."

The defendant further stated that if the victim Harris were alone, he would strangle her and make it look as if she fell in the bathtub and that if both victims were present, he would "take care of" Mrs. Robinson and Miss Mayhew should "take care of" Mrs. Harris.

Miss Mayhew got out of the car and the defendant handed her her purse which now contained the hammer. The couple rang the door bell and Mrs. Harris admitted them. After some conversation, Mrs. Harris asked the defendant to move a dresser. After he had done so, Mrs. Harris discovered that she had no money in her purse. Miss Mayhew, knowing that the defendant had stolen the money, said, "Let's go" and he replied, "No."

Mrs. Harris and Miss Mayhew went into the bedroom and engaged in conversation. The defendant, with a hammer in his hand, entered the bedroom and hit Mrs. Harris over the head. The victim got up, said, "Oh, what's this," noticing blood, and went to the bathroom for a towel. While the defendant followed Mrs. Harris into the bathroom, Miss Mayhew called to Mrs. Robinson, who had been sitting in the living room, to call her Aunt Kitty. As Mrs. Robinson approached the phone, which was in the bedroom by the window, the defendant ran over to her and hit her on the head with the hammer. Mrs. Robinson, shouting, "I won't call," fell to the floor.

Mrs. Harris re-entered the bedroom, exclaiming, "Oh, my God. I know this is not your doing, Ziffy." The defendant then hit her again. Both victims were on the floor moaning when the defendant said, "These old bitches won't die."

The defendant left the room, returned with a butcher knife, stepped over Mrs. Harris, and stabbed Mrs. Robinson several times. He then stabbed Mrs. Harris in the chest, and as he did, Miss Mayhew screamed. The defendant told her to "shut up," asked if she wanted to

stay with them and then stabbed Mrs. Harris several times.

The defendant dropped the knife and hammer into a bag, gave it to Miss Mayhew, and said, "Come on." The defendant pushed the bag into a sewer.

The sneakers that the defendant was wearing had blood on the sides and soles and on the cloth above the one-inch rubber sides. The defendant, upon returning home, took them downstairs to the laundry and washed them.

When the victims were discovered the next morning, the bedroom was in a state of disarray with pocketbooks, clothes and papers strewn on the bed and there was blood all over the room. The blood in the bedroom and bathroom contained sneaker prints made by a man wearing fairly new sneakers. The defendant learned about the sneaker prints and disposed of the sneakers that he had worn by throwing them down the incinerator chute.

Detectives asked the defendant what he had been wearing the night before and he responded that, among other things, he had been wearing a pair of black "Little Abner" shoes. That evening, the defendant gave his cousin a pair of black "Little Abner" shoes in exchange for a pair of sneakers. The next day the defendant gave those sneakers to detectives. Later, at headquarters, when told by Mrs. Harris' guests that he had not been wearing shoes, but sneakers, the defendant admitted same.

The defendant testified on his own behalf. He claimed that upon their return from the pizza parlor, Miss Mayhew said that she would go upstairs and ask her aunt for money. He further testified that after she left the car, he waited thirty to forty-five minutes for her to return before he went to the apartment. The defendant states that Miss Mayhew told him there had been a fight and he walked into the bedroom to call the hospital, did not, and left the apartment without entering any other room. The defendant claimed that he disposed of Miss Mayhew's pants along with his sneakers.

The defendant was convicted of the crimes of Murder in the Second Degree (four counts), Attempted Robbery in the First Degree and Possession of a Weapon in the Fourth Degree (two counts). He was sentenced to concurrent terms, the maximum of which was twenty-five years to life.

POINT I

The trial judge properly charged the jury.

The indictment charged the defendant as the actual perpetrator and as being criminally liable for the commission of the crimes if actually committed by another.

> "There is no distinction between liability as a principal and criminal culpability as an accessory and the status for which the defendant is convicted has no bearing upon the theory of the prosecution (*People* v. *Katz,* 209 N.Y. 311, 325-326; *People* v. *Corbalis,* 178 N.Y. 516, 523 (concurring opn); *People* v. *Henry,* 18 A.D. 2d 293)."
>
> *People* v. *Duncan,* 46 N.Y. 2d 74 (Petitioner's appendix, p. 39).

As the evidence unfolded, it became apparent that the crimes charged were committed as alleged and that, in some way, Miss Mayhew was also a participant. Thus, the trial judge charged as a matter of law, that Miss Mayhew was an accomplice because she "participated in some of the criminal conduct attributed to the defendant." The jury, having been told that as a matter of law Miss Mayhew participated in the criminal conduct, could not find that the defendant alone committed the crimes. Seeking clarification, they sent a note to the judge asking, "the element of guilt between partners in crime." In response the trial judge charged Section 20.00 of the Penal Law, "criminal

liability for conduct of another." (Petitioner's appendix, p. 49)

> "Since the jury was already charged that Mayhew was an accomplice as a matter of law, the court's amplification of the charge with respect to the scope of accessorial liability was entirely proper."
>
> (*People* v. *Duncan, supra,* Petitioner's appendix, p. 39).

Counsel for the defendant did not voice any exception to the intended charge and only argued that in light of the judge's determination to charge Section 20.00 of the Penal Law, the jury should also be charged "the crimes of criminal facilitation in both the first and second degrees by way of explanation to the jury." (The defendant's first protest was voiced two days after the charge was given.)

The defendant was not precluded from arguing accomplice liability to the jury and he certainly knew it would be in issue. The District Attorney requested a charge on Section 20.00 of the Penal Law, a request on which there was no ruling, and the defendant requested an accomplice charge which was given. In his summation, a defendant may comment on every material matter of fact and in light of the evidence in the instant case, certainly the liability of the defendant for any acts of Miss Mayhew (*People* v. *Ashwal,* 39 N.Y. 2d 105, 383 N.Y.S. 2d 204 (1976)). The defendant did not request the opportunity for further comment (cf. *People* v. *Ferrone,* 204 N.Y. 551 (1912)).

POINT II

The New York statutory scheme does not violate the constitution.

In the instant case the trial judge did not submit "additional theories of liability to the jury," as alleged by the defendant.

"The status for which the defendant is convicted has no bearing upon the theory of the prosecution."

(*People* v. *Duncan, supra,* Petitioner's appendix, p. 39.)

No theory other than those reflected in the evidence and indictment may be submitted to the jury.

"It is reversible error, however, to submit to the jury a theory of liability not supported by the evidence adduced at trial or contained in the indictment."

(*People* v. *Duncan, supra,* Petitioner's appendix, p. 38.)

While no additional theory may be presented, the New York law permits additional summation in an analogous situation when additional evidence is permitted after summation (*People* v. *Ferrone, supra*). Further summation not having been requested, the defendant cannot complain that it was improperly denied to him.

POINT III

The trial court did not wrongfully refuse to permit a witness to testify.

The defendant proposed to call Joseph Allen to testify that in September, 1973, a year before the instant crimes, Miss Mayhew had told him that she was going to the victim's house to get money and that if she awakened she would kill her and then proceeded to the house with a hammer in her purse. The witness had no information relating to the commission of the crimes charged.

As the proffered testimony related only to a collateral matter, the credibility of a witness, it was necessary to lay a proper foundation for its admission. Miss Mayhew

denied having told Allen that she wanted to get money from her aunt, thus a proper foundation was laid for the contrary statement by Allen. She was not however asked whether she had told Allen that she would kill her aunt if necessary to get the money. There was no proper foundation for the testimony of Allen on that issue. As Miss Mayhew testified that she had gotten money from her aunt on a number of occasions and that that was her intention on the night in question, the error in excluding testimony relating to that statement was harmless beyond a reasonable doubt (*Chapman* v. *California,* 386 U.S. 18 (1967)). As there was no proper foundation for the purported threat, its exclusion was proper.

"On cross examination, Mayhew had denied that she told Allen she wanted money from her aunt but was never asked whether she threatened to kill her, the critical inquiry in the entire line of questioning. While it was error to exclude the former statement, such error was indeed harmless since there was no foundation laid which would permit the introduction into evidence of the latter and more crucial statement as to the threat to slay the aunt."

People v. *Duncan, supra,* Appellant's appendix, p. 43.

The defendant having failed to lay the foundation required by state law cannot now be heard to complain that his constitutional rights were violated (cf. *Wainwright* v. *Sykes,* 433 U.S. 72 (1977)).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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